

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7091

United States Court of Appeals
FOR THE SECOND CIRCUIT

FORD MOTOR COMPANY,

Plaintiff-Appellant,

against

M.V. "Austral Entente", her engines, boilers, etc.,

and against

FARRELL LINES INCORPORATED; UNIVERSAL
TERMINAL and STEVEDORING CORPORATION
and FRANK J. HOLLERAN, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT-APPELLEE
FARRELL LINES INCORPORATED**

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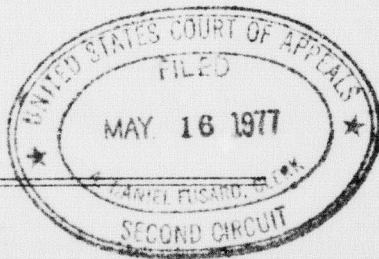


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BRIEF OF DEFENDANT-APPELLEE FARRELL LINES INCORPORATED

Issue Presented

Whether, pursuant to Clause 4 of the Bill of Lading, defendants Universal and Holleran were entitled to the benefit of the \$500 package limitation accorded them and Farrell Lines by the Carriage of Goods by Sea's Act (COGSA) 46 USC 1304 sub. 5 and Clause 25 of the Bill of Lading.

Statement of the Case

This is an appeal by plaintiff-appellant Ford Motor Company from an interlocutory judgment and order entered by Inzer B. Wyatt, District Judge for the Southern District of New York, granting partial summary judgment limiting plaintiff's recovery to \$500 per package against defendants Universal, Holleran and Farrell Lines.

The plaintiff having consented to the granting of the motion with respect to Farrell Lines, the instant appeal is limited to the Lower Court's order with regard to Universal and Holleran.

Following certification by Judge Wyatt pursuant to Title 28 USC Section 1292 b (page 6a), this Court granted leave to appeal (page 32a).*

Facts

The facts stated in the brief of Universal Terminal & Stevedoring Corporation are adopted herein.

In addition, although this appeal is limited to the question of whether Universal and Holleran are entitled to the benefits and exemptions under the aforementioned clauses while performing services relating to other shippers' cargo it is not conceded that the damage was occasioned by the breaking loose of a mining machine in the hatch alleged by plaintiff (appellant's brief page 3) but for purposes of the motion and this appeal it is assumed that such was the fact.

* References are pages in the joint appendix.

POINT I

Both Holleran and Universal are clearly intended to be beneficiaries of the \$500 package limitation contained in Clauses 4 and 25 of the Farrell Lines bill of lading.

While an ocean carrier's Bill of Lading has been construed as a contract of adhesion, The Supreme Court and this Court have held in a long line of cases that the parties to the contract can agree to limit the liability of third parties: *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297; *Bernard Screen Printing Corporation v. Meyer Line*, 328 F. Supp. 288, aff'd (2 Cir.) 464 F (2d) 934; *Carle & Montanari, Inc. v. American Export Isbrandtsen Lines*, 275 F. Supp. 76, affirmed 386 F. 2d 839 (2 Cir.).

These decision however, require that the intention of the parties be expressed clearly in the contract.

Clause 4 of the Farrell Lines Bill of Lading fits squarely within this requirement.

Plaintiff asserts several spurious contentions and without belaboring the points certain comments are necessary:

Firstly it argues that the language of 4 (a) having used the terms "*this contract*" requires a finding that any services performed by the Stevedores or Lashers with respect to the loading or securing of other cargo aboard the ship restricts the benefit of the limitation clause. In support thereof it cites Judge Edelstein's decision in *Cabot Corp. v. S.S. "Mormacscan"*, 298 F. Supp. 1171, which was affirmed for other reasons, 441 F.2d 476 (2 Cir.).

Secondly, appellant concludes that too many words are used to express the limitation and suggests, remedially, that further verbiage is necessary so that Ford Motor Company would have the capability to understand this "indecipherable" language.

Without denigrating the capability of Ford Motor to understand the language of Clause 4, the language is neither indecipherable nor unclear. It expresses an intent to limit the liability of those contractors performing services to the vessel to that equal but no more than, that to which the vessel is entitled. What appellant neglects to argue is this important distinction that Judge Wyatt found between the Bill of Lading in the *Cabot* case and the one in issue. While the pertinent portion of the Cabot Bill of Lading merely states that it intends to cover "all persons rendering services in connection with performance of this contract", Clauses 4b and c of the Ford Bill state,

- (b) *Without limitation or restriction* [emphasis supplied] of the exemptions and immunities from and limitations of liability provided for in subdivision (a), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under Clauses 25 and 26 of this bill of lading.
- (c) *Without limitation or restriction* [emphasis supplied] of the exemptions and immunities from and limitations of liability provided for in subdivisions (a) and (b), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under the U.S. Carriage of Goods by Sea Act, including but not limited to Sections 3(6), 4 (1), 4(2)(a), 4(2)(b) and 4 (5) of said Act.

Clause 4b incorporates Clause 25 of the Bill of Lading which limits appellant's recovery to \$500 per package as does the incorporation of Section 4(5) of the Carriage of Goods by Sea Act into Clause 4c. There is no mention in (b) and (c) that the limitation or restriction is limited or conditioned upon services being performed in connection

with this contract or the actual loading or lashing of Ford's cargo. Those persons referred to in 4 (b) and (c) are:

Master, officers, crew members, *contractors*, *stevedores*, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier in the performance of such work or services. [emphasis supplied]

The work of the Stevedore and the Lashers is so inextricably woven into the fabric of American Shipping that those in the shipping business, as is appellant would clearly understand that those persons would be entitled "without limitation or restriction" to the package limitation or in fact any limitations so stated that benefited the carrier. Ford Motor having consented to the fact that Farrell Lines was entitled to the limitation, both Universal and Holleran "without limitation or restriction" are entitled to the same benefit and exemption.

Appellant asserts no confusion with an understanding of the words "without limitation or restriction in 4 (b) and (c) but asks this Court to find that it is limited by the use of the words "this contract" contained in 4 (a). As correctly found by Judge Wyatt no such intention is expressed by the parties.

Finally appellant asserts that since 4 (a) does not include the term Lasher then it cannot be included under the term "contractor". Again, appellant seeks additional verbiage of almost mindless simplicity. This of course is not necessary. As Judge Newman so aptly held in *Bernard Screen*:

Clarity is not synonymous with specificity. In *Carle & Montanari*, the bill of lading referred to "all agents and all stevedores". The substitution of the words "independent contractors" for "stevedores" in a contract drawn by persons engaged in the shipping in-

dustory was intended to have some significance. To exclude "stevedores", who are independent contractors, from the scope of the more inclusive term would, in effect, be holding that parties by using the more inclusive term had accomplished the opposite result.

CONCLUSION

The order and judgment of Judge Wyatt limiting to \$500 the recovery of the plaintiff as against defendants Universal and Holleran should be affirmed in all respects.

Respectfully submitted,

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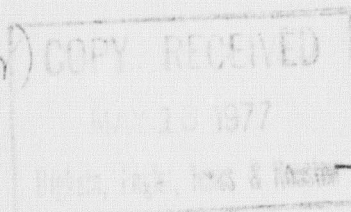
Of Counsel:

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Due and timely service of Two copies
of the within BRIEF is hereby
submitted this 16th day of MAY 1977

HILL, BETTS & NASH By *R. S. Seltzer*
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